APPEAL NO. 92129
FILED MAY 14, 1992

On February 28, 1992, a contested case hearing was held in _____, Texas, (hearing officer) presiding as hearing officer. He determined that the appellant had not proven by a preponderance of the evidence that she gave timely notice to her employer of her injury on (date of injury). He denied benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts.8308-1.01 *et seq.* (Vernon Supp 1992) (1989 Act). Appellant disagrees with several of the hearing officer's conclusions of law and asks that we review the decision and, as we understand her position, reverse and render a new decision.

DECISION

Finding the evidence sufficient to support the findings, conclusions and decision of the hearing officer, we affirm.

The issues at the contested case hearing were: (1) "[w]hether the [appellant] sustained a new injury in the course and scope of her employment on March 14, 1991, or current problems are related to a prior injury" and (2) "[w]hether [appellant] reported the injury timely to her employer." The hearing officer found that the appellant's injury on (date of injury), was distinct from her prior injury and concluded that she had proved by a preponderance of the evidence that on (date of injury), she suffered a new injury to her back. The only issue on appeal is the timeliness of notice of the injury to the employer.

Article 8308-5.01(a) of the 1989 Act provides in pertinent part that:

(a)An employee or a person acting on the employee's behalf shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs. If an injury is an occupational disease, the employee or person shall notify the employer of the injury not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment.

Article 8308-5.02 provides that:

An employee's failure to notify the employer as required under Section 5.01(a) of this Act relieves the employer and the employer's insurance carrier of liability under this Act unless:

(1)the employer or person eligible to receive notification under Section 5.01(c) of this Act or the insurance carrier has actual knowledge of the injury;

(2)the commission determines that good cause exists for failure to give notice in a timely manner; or

(3)the employer or insurance carrier does not contest the claim.

The evidence at the contested case hearing indicated that the appellant had sustained a serious back injury in 1986 for which she subsequently underwent spinal surgery. The medical expenses covering the prior injury continued to be paid by the carrier at least up to October 9, 1991. In March 1989, the appellant went to work for (employer) who carried workers' compensation coverage with the respondent. According to the appellant, on (date of injury), while serving as a checker, she lifted a 40 pound bag of dog food out of a cart and experienced back pain, her legs gave out, she got a headache, she started sweating and held herself up by pressing against the counter. She asked to close her counter and take a break but was denied permission. She subsequently closed up and went to the break room where she called Dr. Z's office for an appointment and was given one for March 14th. She worked on the 13th of March and called in sick on the 14th so she could go to her appointment.

According to the appellant, Dr. Z indicated that tests were necessary which were set for the next day, March 15th. She had a CAT Scan and returned a week or two later to get the results. She was told that there was a slight injury but that the doctor couldn't be exact and that more examinations were needed. The appellant told the doctor that "I needed to know the exact damage because it happened at work and I needed to notify my employer." She subsequently had a myelogram on April 15th and 16th and a discogram on May 20 and 21, 1991. Two or three weeks later, she went for the "prognosis" at which point Dr. Z told her that she had a new injury because it was in a different area than her prior injury. He also referred her to another doctor for a second opinion. On June 8, 1991, this doctor told her that she probably had a new injury and she had a right to tell her boss. Appellant testified that "the reason I took more than 30 days to let my boss know was because the doctors could not find the exact prognosis until further examination was done. I had intentions of letting the company know before, but I needed more evidence to conclude to the findings that were done by both doctors." On July 12, 1991, the appellant asked if the opinion had changed and was advised it had not. On July 19, 1991, she claims that she told JR, a supervisor, that she had injured herself on the job and gave details how it happened. According to the appellant, this was the first time she reported her injury to her employer. She subsequently filed a report of injury with the Texas Workers' Compensation Commission on October 2, 1991.

The appellant's mother testified over a telephonic hookup that her daughter told her about hurting her back at work by picking up a 40 pound bag of dog food. This was in March 1991 and was told to her on the day it happened. The appellant's mother stated that the appellant was in a great deal of pain on (date of injury). In a separate statement admitted into evidence, the appellant's mother was specific that it was (date of injury) when the appellant said she was hurt and that she reported it to her employer during the week of July 15th to 19th.

Several other witnesses called by the appellant indicated that she had told them

about her back being hurt although they had not witnessed it. These witnesses stated that the appellant told them she reported the injury to her supervisors but they did not remember exactly when this occurred. None of these witnesses was present when the appellant reported her injury. The appellant also introduced several statements from persons acquainted with her job assignments and duty performance. These statements do not concern the timeliness of notice issue.

The respondent called Mr. JR who testified that he is the Unit Director of the store where the appellant was employed until October of 1991. He specifically denied any knowledge of the appellant's injury or any report of any injury by the appellant prior to October 3, 1991, when the appellant filed a form with the Texas Workers' Compensation Commission asserting an injury on (date of injury). He was not aware of appellant's missing any work as a result of an injury. He stated if an injury had been reported, an "E-1" report would have been filed, as it was on October 3, 1991. He acknowledged having a conversation with the appellant in July, 1991, about her complaints with the job and some other workers, but nothing was mentioned about any injury. He also stated he was not aware of her prior back injury.

The Conclusions of Law with which the appellant disagrees are:

Conclusion 4:That [appellant] has not proven by a preponderance of the evidence that she gave timely notice to her employer of her injury on (date of injury).

Conclusion 5:That [appellant] knew or should have known on (date of injury), that she had suffered an injury within the course and scope of her employment.

Conclusion 7:That [appellant] did not make a timely report of her injury to her employer.

It is clear from the record in this case that the appellant was claiming that she sustained a specific injury on a specific date and was not asserting repetitive trauma as the basis of her injury. In this regard, her testimony was consistent on this point and she related her injury to the specific act of picking up a 40 pound bag of dog food after which she experience the symptoms set out above. Too, her mother's testimony is completely consistent with the assertion of a specific incident on a specific date. Therefore, the notice requirements relating to occupational diseases, which include repetitive trauma injuries (Article 8308-1.03 (36)), are not in issue. *Compare* Texas Workers' Compensation Commission Appeal No. 91026 (EP-00003-91-CC-1) decided October 18, 1991.

The hearing officer found, *inter alia*, that the injury occurred on (date of injury); that appellant did not give notice to her employer on that date; that she told Dr. Z in late March or early April that her injury occurred at work; and, that she reported her injury to her

supervisor, Mr. JR, on July 19, 1991. There is evidence sufficient to support these findings; indeed, these finding comport with the testimony of the appellant. Although the supervisor testified that no injury was reported until October, the hearing officer apparently did not give credibility to this part of his testimony. Of course, as the fact finder, he can believe all, part or none of any witness' testimony. Taylor v Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility it is to be given. Article 8308-6.34(e).

We believe there was probative evidence to support the hearing officer's finding and conclusion that the appellant knew she sustained an on-the-job injury on the date of its occurrence, (date of injury). She later was informed by her doctors that it appeared the injury was different from the old injury and related to her job. All of these events occurred in excess of 30 days prior to July 19, 1991, the date the hearing officer found that she first notified her employer of the job-related injury. In Texas Workers' Compensation Commission Appeal No. 91016 (Docket No. AM-00001-91-CC-3) decided September 6, 1991, Panel No. 1 held a claimant failed to give timely notice of her job- related injury where she had related to her doctor on January 11th that she suspected her back pain related to her job (she had suffered a previous back injury) and the doctor, on February 11th, stated his agreement that the work was causing her problem and the claimant did not notify her employer until March 22nd. We believe the holding in that case is instructive in the case *sub judice*.

The appellant's reason for not notifying her employer in a timely manner, *i.e.* that she waited for repeated medical confirmation that it was a new injury and wanted conclusive evidence of what the doctors had to say in the first examination, was quite apparently not accepted by the hearing office to excuse the failure to give notice not later than the 30th day after the injury. Although not specifically stated at the hearing in the term "good cause," it is clear that the appellant was urging this as the reason she did not give notification within 30 days following (date of injury). From the circumstances in this case and the evidence of record, a finding that good cause was not shown can be appropriately implied. Charter Oak Fire Ins. v. Hollis, 511 S.W.2d 583 (Tex. Civ. App.-Houston [14th Dist] 1974, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 91071 (Docket No. TY/91089787/01-CC-TY41) decided December 30 1991; and, Texas Workers' Compensation Commission Appeal No. 92003 (Docket No. HO-00147-91-CC-1) decided February 12, 1992. Under the circumstances, we agree that good cause has not be shown for the untimely filing of notice of injury by the appellant.

The decision of the hearing officer is affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Philip F. O'Neill
Appeals Judge